Supreme Court, U.S.
FILED
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No. 90-7477

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM LEWIS SMITH,
Petitioner,

v.

WAYNE S. BARRY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED MARCH 22, 1991
CERTIORARI GRANTED JUNE 28, 1991

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Entry
09.27.83	Complaint filed.
10.07.83	Order (Black J.) (dated Sept. 23, 1983) permitting plaintiff to proceed *in forma pauperis*.
10.18.85	Order (Klein, U.S. Magistrate) appointing [counsel] for plaintiff.
01.04.85	Order (Black, J.) (dated Dec. 26, 1984) "GRANTING" Motion of Defendant *Barry* to Dismiss; "DISMISSING" Case as to said Defendant; and "REFERRING" Remainder of case to U.S. Magistrate (Klein) for processing and disposition as therein set forth.
02.22.88	Jury trial—FIRST DAY.
02.24.88	Oral Motion of Defendants for Directed Verdict made at the conclusion of plaintiff's case-in-chief—"GRANTED" as to Defendants *Collins, Galley, Carpenter, Hall,* and *Turner.* "GRANTED" in part and "DENIED" in part as to remaining defendants.
02.25.88	Renewed oral motion of Defendants for Directed Verdict made at the conclusion of all evidence—"DENIED."
02.25.88	*VERDICT*: In favor of Plaintiff against Defendants ELLIS and PORECKI on the claim of deliberate indifference to his medical and psychological needs; and in favor of Defendants BROWN, JACKSON, VICTOR, and WILKENS against Plaintiff on the claim for use of excessive force; and awarding Plaintiff compensatory damages in the amount of Fifteen Thousand Dollars ($15,000) as to his claim of deliberate indifference to his medical and psychological needs.

Date	Entry
02.29.88	JUDGMENT (Black, J.) "ENTERED" In favor of Plaintiff WILLIAM LEWIS SMITH against Defendants ROBERT ELLIS and DANIEL PORECKI on the claim of Deliberate indifference to plaintiff's medical and psychological needs, and awarding plaintiff compensatory damages in the amount of fifteen thousand dollars ($15,000.00) and "ENTERING" Judgment in favor of defendant R. BROWN, OFFICER JACKSON, SERGEANT R. VICTOR, OFFICER WILKINS, JON P. GALLEY, GEORGE H. COLLINS, COMMANDER CAPTAIN CARPENTER, OFFICER R. HALL AND SERVEANT (sic) ARNOLD TURNER against plaintiff WILLIAM LEWIS SMITH.
03.04.88	Motion of Defendants Ellis and Porecki for Judgment Nothwithstanding the Verdict and Memorandum.
03.15.88	Motion and Order (Black, J.) dated 3/14/88, that the time for filing Motion for Attorney's fees is extended to 20 days after the court's ruling on the pending motion for judgment notwithstanding the verdict.
03.22.88	Notice of Appeal of Plaintiff.
04.13.88	Motion for Judgment Notwithstanding the Verdict is denied. Memorandum opinion filed April 14, 1988.
04.13.88	Informal briefing order filed [by Court of Appeals]. [briefs] due: 05/04/88.
04.28.88	Informal brief filed by Appellee [Barry].
05.04.88	Informal brief filed by Smith.
05.12.88	Notice of appeal filed by Defendants Galley, Collins, Carpenter, Victor, Turner, Hall, Brown, Jackson, Wilkins, Ellis, and Porecki. [USCA Dkt. No. 88-07169]

Date	Entry
06.24.88	Supplemental informal brief dated: 06/24/88 filed by Appellee [Barry].
07.20.88	Supplemental informal brief dated: 07/20/88 filed by Smith.
11.07.88	Order entered pursuant to Fed. R. App. P. 42(b) dismissing appeal No. 88-07169 [filed by Defendants Galley, Collins, Carpenter, Victor, Turner, Hall, Brown, Jackson, Wilkins, Ellis, and Porecki] by agreement of the parties.
08.02.89	Clerk order filed assigning Steven H. Goldblatt as counsel for Smith. Briefing order filed.
11.29.90	Judgment order and published opinion filed by Court of Appeals.
12.26.90	COURT [of Appeals] ORDER filed denying motion for rehearing, denying motion for [sic] suggestion for reh[earing] in banc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. B-83-3395

WILLIAM LEWIS SMITH #148098

v.

JON P. GALLEY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE DIVISION OF CORRECTIONS, DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES; GEORGE H. COLLINS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS WARDEN OF THE MARYLAND PENITENTIARY; COMMANDER CAPTAIN CARPENTER; SERGEANT A. VICTOR, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES AS CORRECTIONAL OFFICERS OF THE MARYLAND PENITENTIARY; SERGEANT ARNOLD TURNER, OFFICERS R. HALL, R. BROWN, OFFICERS JACKSON AND OFFICER WILKINS, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES AS CORRECTIONAL OFFICERS OF THE MARYLAND PENITENTIARY; WAYNE S. BARRY, AS MEDICAL DOCTOR OF THE MEDICAL DEPARTMENT OF CORRECTIONS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, ROBERT ELLIS, AS PSYCHOLOGIST, AND DANIEL PORECKI AS PSYCHIATRIST, OF THE MARYLAND DEPARTMENT OF CORRECTIONS, INDIVIDUALLY, AND IN THEIR OFFICIAL CAPACITIES AS DOCTORS OF THE MARYLAND PENITENTIARY

MEMORANDUM

[Filed 1/4/85]

On September 27, 1983, the plaintiff, an inmate at the Maryland Penitentiary, filed a complaint pursuant to 42 U.S.C. § 1983 against Jon P. Galley, the Commissioner of the Division of Correction; George H. Collins, Warden of the Maryland Penitentiary; seven correctional officers of the Maryland Penitentiary; Wayne S. Berry, Medical Doctor; Robert Ellis, Psychologist; and Daniel Porecki, Psychiatrist. With the exception of Barry, all defendants have seasonably responded by filing a general denial answer to the allegations contained in the complaint. *See* Papers No. 16, 18 and 26. Defendant Barry has moved to dismiss the complaint as against him (Paper No. 23), to which the plaintiff has responded (Papers No. 27 and 28). Defendant Barry asserts that the case against him should be dismissed as he did not act under color of state law when he provided medical services to the plaintiff and is, therefore, not subject to suit under that section. Under 42 U.S.C. § 1983, plaintiff must prove that defendant acted "under color of state law". *Polk County v. Dodson*, 454 U.S. 312, 315 (1981). Barry's affidavit attached to his motion to dismiss clearly shows, and it is uncontradicted by the plaintiff, that he was an employee of Chesapeake Physicians, P.A. at all pertinent times regarding this complaint. He further swears that he had no custodial or supervisory duties but acted solely in the capacity of a physician. (*See* Attachment to Paper No. 23). Plaintiff, in his response to defendant's motion does not discuss the question of whether or not Dr. Barry acted "under color of state law". Rather, plaintiff alleges that there was "deliberate indifference to serious medical needs" by Dr. Barry. The ruling on defendant's motion was held in abeyance pending the decision of the Fourth Circuit in the case of *Calvert v. Sharp*, No. 83-6569 (4th Cir. November 9, 1984). The defendant in *Calvert* was also a physician employed by Chesapeake Physicians, P.A. The Fourth Circuit held that "[i]n exercising his judgment in the treatment of inmates, the private physician performs a private function traditionally filled by re-

tained physicians. The professional obligations and functions of a private physician establish that such a physician does not act under of color of state law when providing medical services to an inmate." *Id.* at 6. Thus, the complaint against Dr. Barry must be dismissed.

For the reasons stated above, a separate Order will be entered dismissing the cause of action as against Dr. Barry and referring the matter to a United States Magistrate for processing and disposition as a complaint challenging conditions of confinement.

DATE: December 26, 1984

/s/ Walter E. Black, Jr.
WALTER E. BLACK, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

(Caption Omitted in Printing)

ORDER

[Filed 1/4/85]

For the reasons stated in the attached Memorandum it is this 26th day of December, 1984, by the United States District Court for the District of Maryland ORDERED:

1. That the motion to dismiss of defendant Barry BE, and the same hereby IS, GRANTED.

2. That the subject action BE, and the same hereby IS, DISMISSED AS TO DEFENDANT BARRY.

3. That insofar as the remaining complaints are concerned, the matter BE, and the same hereby IS, referred to Daniel E. Klein, Jr., United States Magistrate, for processing and disposition as a complaint challenging conditions of confinement.

4. That the Clerk of the Court is directed to mail copies of this Order and foregoing Memorandum to the plaintiff and counsel for all parties.

/s/ Walter E. Black, Jr.
WALTER E. BLACK, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

(Caption Omitted in Printing)

JUDGMENT

This action came on for trial before the Court and a jury. The plaintiff's case having been tried, and defendants having orally moved for a Directed Verdict at the conclusion of plaintiff's case-in-chief, and the Court having granted said motion as to defendants Collins, Galley, Carpenter, Hall and Turner, and granting in part and denying in part, said motion as to remaining defendants; and the jury having answered and returned the Special Verdict Form,

It is Ordered and Adjudged that Judgment be and the same hereby is ENTERED in favor of plaintiff William Lewis Smith against defendants Robert Ellis and Daniel Porecki on the claim of deliberate indifference to plaintiff's medical and psychological needs, and awarding plaintiff compensatory damages in the amount of Fifteen Thousand Dollars ($15,000), and

It is further Ordered and Adjudged that Judgment be and the same hereby is entered in favor of defendants R. Brown, Officer Jackson, Sergeant R. Victor, Officer Wilkins, Jon P. Galley, George H. Collins, Commander Captain Carpenter, Officer R. Hall, and Sergeant Arnold Turner against plaintiff William Lewis Smith.

Dated at Baltimore, Maryland this 29th day of February, 1988.

/s/ Walter E. Black, Jr.
WALTER E. BLACK, JR.
United States District Judge

[Filed 2/29/88]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

(Caption Omitted in Printing)

ORDERED this 14th day of March, 1988, that the time for filing motion for attorney's fees is hereby extended to 20 days after the Court's ruling on the pending motion for judgment notwithstanding the verdict.

/s/ Walter E. Black, Jr.
WALTER E. BLACK, JR.

[Filed March 15, 1988]

[Entered on face of letter from counsel for Smith to the District Court. Letter omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

(Caption Omitted in Printing)

NOTICE OF APPEAL

Notice is hereby given that WILLIAM LEWIS SMITH, plaintiff above named, appeals to the United States Court of Appeals for the 4th Circuit from the judgment/order of the United States District Court for the 1 District of Maryland, entered in this action on March 15, 1988.

Respectfully submitted,

/s/ William Lewis Smith
WILLIAM LEWIS SMITH pro se
#148-098
Roxbury Correctional Institution
Route 3, Box 4444
Hagerstown, Maryland 21740

Dated: March 15, 1988 [Filed 3/22/88]

(Certificate of Service Omitted in Printing)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-7096

SMITH

v.

GALLEY

ORDER TO PROCEED ON INFORMAL BRIEF

[Filed 4/13/88]

This appeal having been filed in this Court and it appearing that at least one party is proceeding without counsel, IT IS ORDERED:

1. The case shall be submitted on the lower court record and, at the election of the parties, on informal briefs, the form for which is attached. Parties may, but need not, cite statutes and legal authority to support their contentions. Only the basic facts and issues need be set forth, as requested on the form. If a supporting memorandum is essential to address the issues adequately, it may attached to the briefing form.

The Court will review the entire record on appeal for possible meritorious issues, it will not limit its review solely to the issues raised in the parties' briefs.

2. The six-digit docket number appearing on the first page of this order shall be placed prominently on every paper filed by any party to this appeal, as well as on all correspondence addressed to the Court.

3. Parties electing to submit informal briefs shall mail their briefs to the Court, with copies to all parties, NO LATER THAN May 4, 1988.

4. The original and one copy of the parties' briefs shall be mailed to the Court, with first class postage prepaid and affixed, addressed as follows:

United States Court of Appeals
for the Fourth Circuit
United States Courthouse
10th and Main Streets
Richmond, VA 23219

5. Every document mailed to the Court by any party must bear a notation that a complete copy thereof was mailed to all other parties at the same time; the Court must receive the original and one copy of every such document. The notation must show the complete name and mailing address of the persons to whom the copies were sent and the date of mailing.

6. Extensions of briefing deadlines are not favored by the Court and are granted only for good cause stated in writing. Requests for extensions MUST BE RECEIVED BY THE COURT BEFORE THE EXPIRATION OF THE DEADLINE.

7. Transcript of trial proceedings WILL NOT be prepared at government expense except in those limited cases in which the Court concludes from the briefs, the claims of the parties, and the record that the appeal presents a substantial question that cannot be determined without a transcript.

8. The Court will not appoint counsel or schedule an appeal for oral argument unless it concludes, after having reviewed the case, that the appeal cannot be decided on the basis of the informal briefs and the record. Therefore, it is unnecessary to request the appointment of counsel or oral argument.

9. Appellants may, but need not, file a docketing statement within 10 days of filing of the notice of appeal. The form and instructions should already have been provided to appellant by the district court.

JOHN M. GREACEN
Clerk

(Copy List Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. B-83-3395

WILLIAM LEWIS SMITH

v.

JON P. GALLEY, ETC., *et al.*

MEMORANDUM OPINION

[Filed 4/14/88]

This case was tried before a jury which, after its deliberations, returned a verdict in favor the plaintiff, William Lewis Smith, against the defendants Robert Ellis and Daniel Porecki in the amount of $15,000.00. On February 29, 1988, this Court entered judgment on the verdict. On March 4, 1988, the defendants filed a Motion for Judgment Notwithstanding the Verdict (Paper 62). The plaintiff has filed an opposition to defendants' motion (Paper 63). The Court finds that no hearing is required. *See* Local Rule 6(E).

At the outset, the Court finds that this case was fully tried and argued before the jury by expert counsel. The contentions made by the defendants in their post-trial motion were previously considered and rejected by the Court. The points raised by the defendants do not require that the Court enter judgment notwithstanding the verdict.

In their motion, the defendants assert the right to a verdict in their favor as a matter of law, based on the

assertion that the jury could not find on the evidence presented that the defendants were deliberately indifferent to the plaintiff's medical needs by the denial of a wheelchair. The Court is satisfied that on the basis of the evidence presented at the trial, the jury could weigh the evidence and judge the credibility of the witnesses, reaching a verdict in favor of the plaintiff in accordance therewith. The jury could properly conclude from the testimony of the plaintiff and his witnesses and the testimony of the defendants themselves that the defendants showed the required deliberate indifference, and this conclusion was supported by the testimony of the plaintiff's expert. Under the circumstances, the position of the defendants is without merit and the pending motion will be denied by a separate Order to be entered by the Court.

April 13, 1988

/s/ Walter E. Black, Jr.
WALTER E. BLACK, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

(Caption Omitted in Printing)

ORDER

For the reasons set forth in the aforegoing Memorandum Opinion, IT IS, this 13th day of April, 1988, by the United States District Court for the District of Maryland,

ORDERED:

(1) That defendants' Motion for Judgment Notwithstanding the Verdict (Paper 62) BE, and the same hereby IS, DENIED; and

(2) That the Clerk shall mail copies of the aforegoing Memorandum Opinion and this Order to counsel of record.

/s/ Walter E. Black, Jr.
WALTER E. BLACK, JR.
United States District Judge

[Filed 4/14/88]

LAW OFFICES
WHITEFORD, TAYLOR & PRESTON
Suite 1400
Seven Saint Paul Street
Baltimore, Maryland 21202-1626
301 347-8700

April 21, 1988

Mr. William Lewis Smith
No. 148-098
Roxbury C. I.
Route 3, Box 444
Hagerstown, MD 21740

Re: Smith v. Galley, et al

Dear Mr. Smith:

Mr. Bell has informed me that you have attempted to appeal this matter. Although you did not send me a copy of this Notice of Appeal, I am certain from the circumstances that it is premature and thus void.

I again strenuously urge you not to appeal this matter. I do not think there are any issues which you will be able to prevail upon before the Fourth Circuit. The Order denying the Motion for J.N.O.V. was entered April 13, 1988. This would give you up until May 13, 1988 before you must file an appeal. I would urge you to take by advice and not file an appeal, or at least seek a second legal opinion on the matter.

As you know, our representation of you has now ended with the successful resolution of the Motion for J.N.O.V. I have spoken to your mother and have informed her of this result and I again urge that you get together with your family and mutually decide upon an appropriate way to disburse, handle or invest the judgment that you

will soon be awarded. I have met your mother and your sisters and I believe that they will be very helpful in this regard, and will do their utmost to look after your interests and that of your family. I do not believe, personally, that you should use any of this judgment to hire lawyers to bring further actions on your behalf.

Yours very truly,

/s/ Leo P. Hylan
LEO P. HYLAN

LPH:cal
cc: The Honorable Walter E. Black, Jr.
Civil Action No. B-83-3395
Glenn W. Bell, Esquire

DICTATED BUT NOT READ

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

88-7096

SMITH

v.

GALLEY

CA-83-3395-B

INFORMAL BRIEF SUBMITTED ON BEHALF OF APPELLEE WAYNE S. BARRY, M.D. IN SUPPORT OF THE DISTRICT COURT'S ORDER GRANTING DR. BARRY'S MOTION TO DISMISS

[Filed 4/28/88]

---

1. Did the district court fail to consider important grounds for relief. If so, what grounds?

   In granting Dr. Barry's Motion to Dismiss this action against him, the district court properly considered all relevant grounds for relief.

2. Did the district court incorrectly decide the facts? If so, what facts.

   In dismissing the appellant's claim against appellee Dr. Barry the district court assumed all facts pleaded by the plaintiff in its complaint were true. The

court's decision as to Dr. Barry was based on the law and did not require finding of facts.

3. Do you think the district court applied the wrong law? If so, what law do you want applied.

In dismissing the action against Dr. Barry, the court applied the correct law.

On or about February 15, 1984, plaintiff, then an inmate at the Maryland Penitentiary, brought this action pursuant to 42 U.S.C. 1983 against a number of defendants including Wayne S. Barry, M.D. As a member of Chesapeake Physicians, P.A., ("CPPA"), a Maryland not-for-profit professional association comprising physicians and other health care personnel providing medical services to the general public, Dr. Barry provided medical care to inmates at the Maryland Penitentiary, including the plaintiff. Plaintiff alleged that Dr. Barry did not provide him with appropriate medical treatment and that Dr. Barry's actions violated 42 U.S.C. § 1983.

Dr. Barry moved for dismissal of the action, basing his motion on three decisions in which the United States District Court for the District of Maryland ruled that CPPA health care personnel do not act under color of state law when they provide medical services to inmates at the penitentiary. *See*, memorandum in support of motion to dismiss attached hereto as Exhibit A.

The district court granted Dr. Barry's motion to dismiss, finding that he did not act under color of state law in providing medical services to the plaintiff and, therefore, was not subject to suit under § 1983. The district court ruled:

> Barry's affidavit attached to his motion to dismiss clearly shows, and it is uncontradicted by the plaintiff, that he was an employee of Chesapeake Physicians, P.A. at all pertinent times regarding this complaint. He further swears that he had no custodial or supervisory duties but acted solely in the capacity of a physician.

In support of its ruling, the Court relied on *Calvert v. Sharp*, 748 F.2d 861, (4th Cir. 1984) *cert. denied*, 105 S.Ct. 2667 (1985). In that case, the Fourth Circuit held that in treating inmates, a physician employed by Chesapeake Physicians, P.A. was not acting under color of state law and, therefore, could not be sued pursuant to 42 U.S.C. 1983 (*See*, Memorandum of district court attached hereto at Exhibit B).

4. Do you feel that there are any other reasons why the district court's judgment was wrong? If so, what?

The district court's decision was correct for the reasons described above.

5. What action do you want the Court to take in this case?

The United States Court of Appeals for the Fourth Circuit should affirm the district court's decision granting Dr. Barry's Motion to Dismiss.

6. If you think the Court should hear oral argument in this case, why do you think so?

Because the district court's decision dismissing the suit against Dr. Barry was correct pursuant to established law in this Circuit, oral argument probably would not be necessary, although counsel, of course, stands ready to orally argue the case should the Court so desire.

/s/ David H. Bamberger
DAVID H. BAMBERGER

/s/ Elaine Marzetta Lacy
ELAINE MARZETTA LACY

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Attorneys for Appellee Wayne S. Barry, M.D.

(Certificate of Service Omitted in Printing)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

(Caption Omitted in Printing)

INFORMAL BRIEF

[Filed 5/4/88]

Directions: Answer the following questions about the appeal to the best of your ability. Use additional sheets of paper, if necessary. You need not limit your brief solely to this form but you should be certain that whatever you file answers the questions below. In any event, the court prefers short and direct statements.

1. Did the district court fail to consider important grounds for relief. If so, what grounds?

   (a). Yes, The court only appointed counsel to represent the Plaintiff on his 42. U.S.C. 1983 complaint. The plaintiff had filed on July 26, 1985, "Motion For Leave To File Amended Complaint or Supplemental Complaint" into the Court seeking counsel for his serious medical problems, and requesting a Preliminary Hearing. Requesting appointment of Counsel.

   (b). The Court appointed counsel and at trial The plaintiff counsel and the defendants' counsel concealed vital evidence . . . See attached extra sheet, 1-b.

2. Did the district court incorrectly decide the facts? If so, what facts?

   It is Plaintiff contention that the Court and Jury was unable to rule fairly to the facts, and the awarding of damages in to Plaintiff, due to the facts that vital

evidence (medical records, exhibits, witness, and other issues of extreme importance to my case.), was being suppressed by Plaintiff's counsel and the defendants' counsel. This suppression by both attorneys', of evidence, was done without my knowledge and against my wishes. The plaintiff had requested in his complaint to properly conduct his medical records in open court.

3. Do you think the district court applied the wrong law? If so, what law do you want applied?

   I don't know.

4. Do you feel that there are any other reasons why the district court's judgment was wrong? If so, what?

   (a). *A conflict of Interest*; the lawfirm of WHITEFORD, TAYLOR & PRESTON, and plaintiff's counsel are affiliated to partipants in plaintiff's previous lawsuit, which is the parties members. Thus, the plaintiff was denied his constitutional right to a fair and impartial trial for the reason that Plaintiff attorney failed to adequately and competently represent him; Also, Plaintiff was denied his constitutional right to due process and equal protection of law. Thus, the plaintiff beleave this resulted in the Court being unable to render a fair decision in my case.

5. What action do you want the Court to take in this case?

   (1). A new trial on all issues triable by Jury.

   (2). (a). That Plaintiff's medical records are properly conducted in the Court. (b). The Court to investigate conflict of Interest. The plaintiff beleave that there were conspiracy acts by his attorney and defendants' attorney, to suppress plaintiff medical records; thus, leaving the Court and Jury unable to ren-

der a fair decision and/or verdict in the Plaintiff Case. (c). The Plaintiff beleave that the Court should review all evidence pretaining to his case, and the award of damages which plaintiff do beleave was grossly inadequate . . . See attached extra sheet; 5-d.

6. If you think the Court should hear oral argument in this case, why do you think so?

   Yes, the Plaintiff do beleave in all fairness to his case, and for himself, his legal counsel, and/or representative, to be allowed to hear in open Court Plaintiff's medical records, presentment of all evidence, be it physical or oral, the Plaintiff do beleave that it will give the Court and Jury a clearer vision of Plaintiff's medical condition, that his counsel and defendants counsel suppressed from the Court by ruling out.

/s/ William Lewis Smith
Signature
Notary Not Required

Dated: April 28, 1988

IMPORTANT: A COPY OF THIS BRIEF AND ANY ATTACHMENTS MUST BE SENT TO ALL PARTIES IN THE CASE. PLEASE LIST BELOW THE NAMES AND ADDRESSES OF THE PARTIES WHO WERE SENT A COPY OF YOUR BRIEF, TOGETHER WITH THE DATES ON WHICH THEY WERE SENT.

(List and Certificate of Service Omitted in Printing)

88-7096 Smith vs. Galley, et al.
CA-83-3395-B

William Lewis Smith
ROXBURY CORRECTIONAL INSTITUTE
Route 3, Box 4444
Hagerstown, MD 21740

ATTACHED—Extra Sheet from informal brief:

Continued; 1-b

> . . . (medical records, exhibits, witnesses, and other issues of extreme importance to the Plaintiff's case.) thus, the Plaintiff beleave that the Court and Jury was unable to render a fair verdict and/or decision in his case. This suppression of evidence was done without his knowledge and against his wishes.

Continued; 5-d

> . . . to the suffering the Plaintiff have been subject to, and what he is still enduring. (e). That a U.S. Federal Investigation by the U.S. Justice Department and U.S. Attorney, and to take legal action against all parties who are responsible for their conspiracy to commit fraud, wrong doing, malice, etc., etc., to the Plaintiff. (f). Appellant cost of this suit. (g). Such other and futher relief as law and justice may require.
>
> /s/ William Lewis Smith
> WILLIAM LEWIS SMITH

Dated: April 28, 1988

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

(Caption Omitted in Printing)

SUPPLEMENT TO INFORMAL BRIEF OF APPELLEE WAYNE S. BARRY, M.D.

[Filed 6/24/88]

Appellant William Lewis Smith, who was formerly an inmate at the Maryland Penitentiary and now is incarcerated at the Roxbury Correctional Institution in Hagerstown, Maryland, brought this action against approximately fifteen defendants, including Wayne S. Barry, M.D. At the time in question, Dr. Barry was a private physician who provided medical services to inmates at the Maryland Penitentiary pursuant to a contract with the State of Maryland.

As explained more fully in the Informal Brief previously filed on behalf of Dr. Barry, the United States District Court for the District of Maryland granted Dr. Barry's Motion to Dismiss on December 26, 1984, finding that he did not act under color of state law in providing medical services to the plaintiff and, therefore, was not subject to suit under 42 U.S.C. § 1983. In support of its ruling, the District Court relied on *Calvert v. Sharp*, 748 F.2d 861 (4th Cir. 1984), *cert. denied*, 471 U.S. 1132 (1985). The claims against the remaining defendants were referred to a United States Magistrate for trial. In the Informal Brief filed herein, Dr. Barry referred this Court to its earlier ruling in the *Calvert* case.

On June 20, 1988, the Supreme Court of the United States decided *West v. Atkins*, Case No. 87-5096, which, in effect, overruled *Calvert v. Sharp*. However, notwithstanding the *West* decision, the dismissal of Dr. Barry still should not be reversed, because no appeal from the December 26, 1984 Order of Dismissal was taken by the plaintiff. The Notice of Appeal filed in this action on March 22, 1988 provides:

> Notice is hereby given that William Lewis Smith, plaintiff above named, appeals to the United States Court of Appeals for the 4th Circuit *from the judgment/order* of the United States District Court for the 1 (sic) District of Maryland, *entered in this action on March 15, 1988*. (emphasis supplied)

Thus, the December 26, 1984 dismissal of Dr. Barry is not even before this Court and, therefore, should not be disturbed.

Respectfully submitted,

/s/ David H. Bamberger
DAVID H. BAMBERGER

/s/ Elaine M. Lacy
ELAINE M. LACY

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(Certificate of Service Omitted in Printing)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

(Caption Omitted in Printing)

SUPPLEMENT TO INFORMAL BRIEF OF APPELLANT WILLIAM LEWIS SMITH

[Filed 7/20/88]

Appellant William Lewis Smith, who was an inmate at the Maryland State Penitentiary and now is incarcerated at the Roxbury Correctional Institution in Hagerstown, Maryland, brought this action pursuant to 42 U.S.C. 1983, 1985 and 28 U.S.C. 1343 against approximately 15 defendants, including Wayne S. Barry, M.D. At the time, Dr. Barry was a physician employed by Chesapeake Physicians, P.A. ("CPPA") who provided medical services to inmates at the Maryland State Penitentiary pursuant to a contract with the State of Maryland.

As is more fully set forth in the Memorandum of William Lewis Smith attached as Exhibit 1 to the Supplement to Informal Brief filed herewith, as the Court will see that Appellant tried to protect his legal rights and the Appellees, in addition to other parties associated with them who are now health care providers (PHP incorporation) contracted with the State of Maryland to provide medical treatment to inmates; have all but made it impossible for Appellant to obtain outside (Hospital) medical treatment that is required to relieve his serious medical injuries that he was, and is, being compelled to suffer for numerous months and years by the health care providers contracted with the State of Maryland.

Appellant's serious medical problems remain in existence, and allowed to deteriorate. The Appellant pray's that this Court will consider the fact that, in the enormous amount of time that has past, Appellant has struggled persistently to secure his legal constitutional rights, and in seeking medical treatment that is required to relieve his pain and suffering. Appellant declares that the Appellees acted with gross negligence and in reckless disregard of his medical needs as well as psychiatric needs. And, he has proven that his allegations simply do constitute a prima facie claim.

The health care providers, then, and now, continue to act with gross negligence and in reckless disregard of Appellant's health by deliberately and willfully refusing to transport the Appellant to an outside public hospital to be treated for his medical problems. *Feilder v. Bosshard*, 590 F. 2d 105 (5th Cir. 1979) and *U.S. ex rel Walker v. Fayette City* 599 F. 2d 573 (3rd Cir. 1979). As well as the Appellant's case *Smith v. Galley, et al.*, B-83-3395. *West v. Atkins*, Case No. 87-5096, which in effect, overruled case of *Calvert v. Sharp*, 748 F. 2d 861 (4th Cir. 1984), cert. denied, 471 U.S. 1132 (1985). Dr. Barry's Motion should be denied.

The U.S. District Court was aware of Appellant's place of confinement, as mention in his 42 U.S.C. 1983 complaint and affidavits; also, other court motions that was presented to the Court that had explain the Appellant's inability to present his claims to the U.S. Court. *Cruz v. Beto*, 405 U.S. 319 (1972) *Haines v. Kerner*, 404 U.S. 519 (1972). *Potter v. McCall* 433 F. 2d 1087 (9th Cir. 1970). *Gordon v. Lceks*, 579 F. 2d 1147, 1153 (4th Cir. 1978), *Almond v. Kent*, 459 F. 2d 200, 204 (4th Cir. 1972).

The Appellant, William Lewis Smith, prays that this Court Deny the District Court's order granting Dr. Barry's Motion to Dismiss.

NOTE: The Court has seen the extent of our pressing situation and difficulties inmates are having across the Nation in dealing with outside contractors who will not and/or refuse to treat them for their medical needs.

Respectfully submitted,

/s/ William L. Smith
WILLIAM L. SMITH
#148-098
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Route 3, Box 4444
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(Certificate of Service Omitted in Printing)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

(Caption Omitted in Printing)

Appeal from the United States District Court
for the District of Maryland, at Baltimore
Walter E. Black, Jr., District Judge. (CA-83-3395-B)

Argued: April 3, 1990 Decided: November 29, 1990

Before RUSSELL and WIDENER, Circuit Judges, and SMITH, United States District Judge for the Eastern District of Virginia, sitting by designation.

Dismissed by published opinion. Judge Widener wrote the opinion, in which Judge Russell and Judge Smith joined.

WIDENER, Circuit Judge:

William Smith prosecutes his appeal from two adverse orders of the district court in his action under 42 U.S.C. § 1983. Because Smith did not properly perfect his appeal, we are without jurisdiction to consider the orders in question and we therefore dismiss the appeal.

William Smith, an inmate at the Maryland State Penitentiary, suffers from a psychogenic pain disorder that,

although psychological in nature, causes him severe pain and prevents him from walking. After two prison psychologists decided to deny Smith the use of a wheelchair, Smith brought this action, pro se, pursuant to 42 U.S.C. § 1983 against Commissioner of Corrections Jon Galley, Warden George Collins, staff psychologists Robert Ellis and Daniel Porecki, seven correctional officers, and one private medical doctor, Wayne Barry. Smith alleged that, by denying him the use of a wheelchair, the defendants exhibited a deliberate indifference to his medical needs in violation of the eighth amendment to the Constitution.[1]

Because Dr. Barry was employed not by the state but by a private medical group, the district court dismissed the case as to Dr. Barry because he could not have acted under color of state law for purposes of section 1983.[2] The claims against the remaining defendants proceeded to a trial before a jury. At the conclusion of Smith's case, the district court directed a verdict in favor of Galley, Collins, and three of the correctional officers. The district court also directed verdicts on the deliberate indifference claim as to the remaining four correctional officers, all prison guards.[3] The jury found that the psychologists, Ellis and Porecki, were deliberately indifferent to Smith's medical needs and awarded Smith $15,000 in damages. A judgment reflecting the district

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[1] Smith also asserted another claim by alleging that several guards beat him. The trial jury found in favor of the guards on the issue, and Smith does not challenge that verdict on appeal.

[2] The district court relied on our decision in *Calvert v. Sharp*, 748 F.2d 861 (4th Cir. 1984), *cert. denied*, 471 U.S. 1132 (1985). The Supreme Court later overruled *Calvert* in *West v. Atkins*, 487 U.S. 42 (1988), which established that a private contract physician who provides medical services to state inmates may act under color of state law for purposes of section 1983.

[3] Smith's excessive force claim was allowed to proceed against four of the guards. See note 1, *supra*.

court's rulings and the jury's findings was entered on February 29, 1988.

On March 4, 1988, Ellis and Porecki filed a motion for judgment notwithstanding the verdict. On March 22, 1988, Smith, acting pro se,[4] filed a notice of appeal. The district court then entered an order on April 14, 1988, denying the psychologists' motion for judgment notwithstanding the verdict. Later, on May 4, 1988, Smith filed an informal brief in this court requesting "[a] new trial on all issues triable by Jury."

Federal Rule of Appellate Procedure 4(a)(4) provides that, if any party files a timely motion for judgment notwithstanding the verdict, a notice of appeal filed before disposition of the motion is ineffective and a new notice of appeal must be filed after the order is entered disposing of the motion.[5] Therefore, Smith does not take exception to the fact that his first notice of appeal was premature and had no effect. Smith contends, however, that his informal brief, which was filed in this court within thirty days of the district court's order disposing

[4] Smith was represented by appointed counsel at trial and in opposing the psychologists' motion for judgment notwithstanding the verdict. Smith filed his notice of appeal without consulting his lawyer. That notice of appeal was from an order of the district court entered March 15, 1988. The only order entered on March 15, 1988, concerned an extension of time for filing a request for attorneys' fees. We do not base our decision on this error, if any, however. See note 7, *infra*.

[5] Fed. R. App. P. 4(a)(4) provides in part:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); . . . the time for appeal for all parties shall run from the entry of the order . . . granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above.

of the psychologists' motion for judgment notwithstanding the verdict, effectively substituted for a second notice of appeal.[6] Relying on his informal brief as a notice of appeal, Smith then challenges the district court's order dated December 26, 1984, which dismissed Dr. Barry as a defendant, and that part of the district court's February 29, 1988, order which entered judgment in favor of the prison guards on the deliberate indifference claim.

The requirements for a notice of appeal are set forth in Fed. R. App. P. 3(c):

> (c) Content of the Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken.

To avoid technical impediments to appellate review, courts construe Rule 3(c) liberally, especially when applied to papers filed pro se by an indigent prisoner. See *Coppedge v. United States*, 369 U.S. 438, 442 n.5 (1962); *Fishbaugh v. Armour & Co.*, 185 F.2d 541, 542 (4th Cir. 1950), *cert. denied*, 342 U.S. 914 (1952). Thus, Rule 3 is satisfied "by any statement . . . that clearly evinces the party's intent to appeal" and which "accomplishes the two basic objectives of the Rule 3 notice requirement: (1) to notify the Court of the taking of an appeal; and (2) to notify the opposing party of the taking of the appeal." *Cobb v. Lewis*, 488 F.2d 41, 45 (5th Cir. 1974). Stated another way, the question we must

[6] If Smith's informal brief is treated as a notice of appeal, it was timely filed. Fed. R. App. P. 4(a)(1) provides:

> [T]he notice of appeal . . . shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from . . . . If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

resolve is whether Smith's informal brief is the "functional equivalent" of a notice of appeal under Rule 3(c). See *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 (1988).

We believe for several reasons that the rationale for allowing other documents to substitute for a notice of appeal simply does not apply to Smith's informal appellate brief filed in this case. First, Smith's informal brief is a preprinted form that the clerk's office sent to Smith because he filed his premature notice of appeal pro se. See Loc. R. 34(b). Thus, the document was not the result of Smith's intent to initiate an appeal, but was merely Smith's response to this court's "Order to Proceed on Informal Brief." There can be no doubt, however, that the papers were filed by Smith as part of the appellate process.

Second, the normal solicitude afforded to pro se litigants is greatly diminished, even if not erased, in this case. When Smith's appointed counsel, who had just concluded Smith's successful opposition to the psychologists' motion for J.N.O.V., heard that Smith had filed a notice of appeal while the motion for J.N.O.V. was pending, he notified Smith by letter dated April 11, 1988, that

> Mr. Bell has informed me that you have attempted to appeal this matter. Although you did not send me a copy of this Notice of Appeal, I am certain from the circumstances that it is premature and thus void. . . . The Order denying the Motion for J.N.O.V. was entered April 13, 1988. This would give you up until May 13, 1988, before you must file an appeal.

Smith's counsel correctly advised Smith of his failure to perfect his appeal, and of the time remaining in which to correct his mistake. Smith, however, did nothing, and has provided no justification to heed counsel's advice.

Finally, in addressing this same issue in a case of first impression, the Fifth Circuit recently stated:

> Faced squarely with the issue, we now determine that an appellate brief will not substitute for a notice of appeal, even if it otherwise meets the requirements of Fed. Rules App. P. 3 and 4. The Federal Rules of Appellate Procedure envision the notice of appeal and the appellate brief as two separate filings. To collapse the two into one would, as the Eleventh Circuit implied, "eliminate entirely the requirement for the filing of a notice of appeal."

United States v. Cooper, 876 F.2d 1192, 1196 (5th Cir. 1989) (quoting *Florida Women's Medical Clinic, Inc. v. Smith*, 706 F.2d 1172, 1173 (11th Cir. 1983)). *Contra Frace v. Russell*, 341 F.2d 901 (3d Cir.), *cert. denied*, 382 U.S. 863 (1965). We agree with the Fifth and Eleventh Circuits and we conclude that, although we should and do afford pro se litigants latitude where warranted, we are not free to rewrite the Federal Rules of Appellate Procedure. The requirements of Rule 3 are jurisdictional and are not subject to harmless error analysis. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 and n.3 (1988).

Accordingly, this appeal is

DISMISSED.[7]

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[7] Appellees also assert that Smith's informal brief fails to comply with Fed. R. App. 3(c)'s command to "designate the judgment, order or part thereof appealed from." The order dismissing Dr. Barry was entered in December 1984, while the order granting judgment to the guards was entered February 29, 1988. Smith's informal brief refers to none of the appellees or the respective orders specifically, however, but merely asks for "[a] new trial on all issues triable by Jury." Even if we refer back to Smith's premature notice of appeal to help fulfill this requirement, see *Foman v. Davis*, 371 U.S. 178, 181 (1962), that notice mistakenly identifies the district court's March 15, 1988, order, which only extended the time for filing Smith's motion for attorneys' fees. In view of our disposition, we express no opinion on this issue. See note 4, *supra*.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

(Caption Omitted in Printing)

Appeal from the United States District Court
for the District of Maryland

JUDGMENT

FILED: November 29, 1990

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal be, and it is hereby, dismissed.

/s/ John M. Greacen
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

(Caption Omitted in Printing)

ORDER

FILED: December 26, 1990

There having been no request for a poll of the court on the petition for rehearing en banc, it is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

With the concurrences of Judge Russell and Judge Smith.

/s/ H. E. Widener, Jr.
For the Court

[Jurat omitted in printing]

SUPREME COURT OF THE UNITED STATES

No. 90-7477

WILLIAM LEWIS SMITH,
Petitioner,

v.

WAYNE S. BARRY, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ON CONSIDERATION of the motion of petitioner for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered that the motion to proceed *in forma pauperis* and the petition for writ of certiorari are granted.

June 28, 1991